Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

BERNARD J. DOLENZ,

Petitioner,

v.

TED MARTIN AKIN, JOHN EARNEST BOUNDY, MILDRED AVERY.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED

Question one: Did the Trial Court err in granting Ted Akin's 12(b)(6) Motion as Ted Akin was not a Judge on November 22 and December 22, 1994: Ted Akin wholly lacked jurisdiction during those dates as he was not properly assigned pursuant to the Texas Government Codes (74.052, 74.056, 74.057) on those dates; and the Court must assume as true all material allegations and attachments in the complaint as well as the reasonable inferences from them.

Question two: Did the Trial Court err in dismissing the Civil Rights claims against Boundy and Avery, and refused to retain and adjudicate Dolenz's pendant state law and false imprisonment claims as the Court must accept as true all material allegations in the complaint, as well as reasonable inferences from them.

LIST OF PARTIES

Petitioner: Bernard J. Dolenz, plaintiff and appellant.

Respondent: (1) Ted Martin Akin, defendant and appellee represented by George Stewart Whitehead.

(2) John Earnest Boundy, defendant and appellee represented by Michael C. Scates.

(3) Mildred Aver, defendant and appellee represented by John Earnest Boundy and Michael C. Scates.

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OPINIONS BELOW

On August 4, 1995, Dolenz filed his original complaint and amended it, alleging false imprisonment, conspiracy and violations of 42 U.S.C. § 1983. (L-14; 141-189). Dolenz contends that his civil rights were violated when purported "Judge" Akin incarcerated him for contempt on two occasions – November 22 and December 22, 1994 for alleged discovery abuse. Dolenz contends that Akin in concert with Boundy and Avery were involved in a conspiracy to incarcerate him under color of state action, knowing that one cannot be incarcerated for debt, and that Akin wholly lacked jurisdiction to act as a judge as he was not properly appointed as a judge as mandated by the Government Code and also because the case earlier had been removed to Federal court.

Akin filed a 12(b)(6) motion. The court on March 6, 1996 granted Akin's motion to dismiss because of judicial immunity (282-283; 204-210).

Boundy and Avery untimely filed their 12(b)(6) motions, which the Court treated on its own as a Rule 12(c) motion, and dismissed the 1983 claims and refused to exercise pendant jurisdiction over the false imprisonment claims (421-434).

Although Akin and Avery were parties, the Court disallowed their depositions to be taken and stayed discovery that was outstanding such as interrogatories and request for admissions. When Akin was dismissed as a party the court refused to allow Dolenz to take his deposition as a material witness (214, 420, 438). In short the court tied Dolenz's hands in taking any discovery in spite of its scheduling order that discovery was cut-off on

10/1/96 (299). Final Judgment was rendered January 16, 1997 (435). This Appeals Court affirmed the Trial Court's judgment October 23, 1997. Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED: Filed Dec. 3, 1997. The above decrees are sought to be reviewed and are in the appendix. A Motion to Stay Mandate is before the 5th Circuit.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C.A. Section 1254. The Petitioner seeks to set aside the Judgments and Opinions of the Trial Court and Appeals Court, as these courts have attempted to circumvent the Texas Government Code of appointing visiting judges and case law by indicating that Ted Akin has some sort of magical "inherent jurisdiction". When a murderer escapes hanging because the "judge" was improperly appointed, this case should secure uniformity of decision in the public interest and be decided by this Court of Last Resort.

STATUTES INVOLVED

§ 74.052. Assignment of Judges

(a) Judges may be assigned in the manner provided by this chapter to hold court when necessary to dispose of accumulated business in the region.

* * *

§ 74.056. Assignment by Presiding Judge

(a) A presiding judge from time to time shall assign the judges of the administrative region to hold special or regular terms of court in any county of the administrative region to try cases and dispose of accumulated business.

* * *

"Sec. 4b. (a) A retiree who makes an election under Section 4a of this Act is, with the retiree's consent to each assignment, subject to assignment:

"(1) by the chief justice of the supreme court to sit on any court of the state of the same or lesser dignity as that on which the person sat before retirement;

"(2) by the presiding judge of the court of criminal appeals to sit as a commissioner of that court; and

"(3) by the presiding judge of an administrative judicial district to sit on a court in that administrative district or, on request of the presiding judge of another administrative judicial district, on a court in that other administrative district, if in either circumstance the court is of the same or lesser dignity as that on which the person sat before retirement.

* * *

§ 74.057. Assignment by Chief Justice

(a) In addition to the assignment of judges by the presiding judges as authorized by this chapter, the chief justice may assign judges of one or more administrative regions for service in other administrative regions when he considers the assignment necessary to the prompt and efficient administration of justice.

* * *

STATEMENT OF FACTS

Petitioner brought suit against Ted Akin, John Boundy, and Mildred Avery for false imprisonment, conspiracy and violations of 42 U.S.C. § 1983 (1-14; 141-189) following two incarcerations for contempt on November 22 and December 22, 1994 for alleged failure to pay a debt.

Dolenz contends that Akin wholly lacked jurisdiction to act as a judge as he was not appointed by presiding administrative judge per Govt. Code 74.056 or 74.057, confirmed by Sandy Hughes' affidavit, (58-61) which shows that Akin was not appointed to act as a judge on DATES of Nov. 22 and Dec. 22, 1994.

Akin filed a 12(b)(6) motion because of purported judicial immunity, which resulted in his dismissal. (282-283; 204-210).

Boundy and Avery UNTIMELY filed their 12(b)(6) motions many months later, but the court dismissed the 1983 claims. (421-434). Final judgment in favor of the defendants was rendered January 16, 1997 (435). The Fifth Circuit upheld the Trial Court and denied a panel rehearing.

Even though the Trial Court disallowed any discovery or depositions, this is known about "Judge" Akin (364):

1. On the DATES of November 22 and December 22, 1994, Akin had no assignment from Presiding Judge Pat McDowell (58-61). There was NO TRIAL, NO MOTION FOR NEW TRIAL, and NO MATTER GROWING OUT OF

A CASE TRIED. (216). There was no assignment/appointment per 74.056 or 74.057, Texas Government Code.

2. Akin had EX PARTE discussions with John Boundy about Dolenz, and ex-parte conversations with TV Channel 8 about videotaping and airing the proceedings over objection.

3. Akin was knowledgeable about Dolenz "whistleblowing" to the Judicial Conduct authorities about his unethical and abhorrent conduct of giving legal advice for homosexual tricks, associating with ex-felons, and using an apartment belonging to an ex-felon for homosexual sex.

4. Akin frequently visited gay bars during the early afternoon wherein he picked up different tricks for homosexual purposes; and discussed legal cases with gay attorneys belonging to some of the major law firms in Dallas, Texas at gay bars.

5. Akin knew about this "whistleblowing" and had knowledge that one cannot be imprisoned for debt before he incarcerated Dolenz. Akin wrote that one cannot be imprisoned for debt in EX PARTE JACKSON, 706 S.W.2d 712 (Tex. App. 5 Dist. 1986). Akin also knew that a Mandamus proceeding was before the Texas Supreme Court. Akin's conduct sounds more in "pay back" than the purported "objectivity and impartiality and without bias" of a true Judge. So much for Canons 1, 2, and 3 of the Code of Judicial Conduct.

6. Akin acknowledged that he himself had no authority on December 22, 1994 when he knew that the case was removed to Federal Court (T-168, L21-22; T-172):

THE COURT: "Let me ask you to comment with respect to the removal of this case to federal court. If it has been properly removed, of course, I have lost jurisdiction." (T-181, L3-5).

THE COURT: "Well, as I understand, if indeed it has been validly removed, I no longer have jurisdiction over those matters." (T-182, L20-22).

In spite of Akin's acknowledgment that he had no jurisdiction, he nonetheless continued over objection and jailed Dolenz for a second time.

7. Ted Akin was not a duly elected or appointed Judge; rather, he was a former Appellate Court Justice. Ted Akin had not been assigned pursuant to the Texas Government Codes 74.049, 74.052, 74.056 or 74.057 or any other law; and, therefore not a Judge or any other governmental official. He was a layman masquerading as a Judge.

SUMMARY OF ARGUMENT

Ted Akin was not a judge on November 22 and December 22, 1994 as he had no assignment from Presiding Judge Pat McDowell or the Chief Justice of the Texas Supreme Court as required by Government Codes 74.052, 74.056, and 74.057. He was a layman and hence lacked judicial immunity. His 12(b)(6) motion should have been denied, and this case should be tried on its merits. Boundy and Avery filed their 12(b)(6) motions untimely,

and in the light of not filing an appellee's brief, should have had their 12(b)(6) motion denied as well.

ARGUMENT

Question one: Did the Trial Court err in granting Ted Akin's 12(b)(6) Motion as Ted Akin was not a Judge on November 22 and December 22, 1994: Ted Akin wholly lacked jurisdiction during those dates as he was not properly assigned pursuant to the Texas Government Codes (74.052, 74.056, 74.057) on those dates; and the Court must assume as true all material allegations and attachments in the complaint as well as the reasonable inferences from them.

STANDARD OF REVIEW

Russel v. Landriew [621 F.2d 1037 (1980)] succinctly gives the standard of review for a 12(b)(6) motion at 1039:

> "Standard of Review [1] An action should not be dismissed for failure to state a claim under Fed.R.Civ.P. 12(b)(6) unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 101, 2 L.Ed.2d 80 (1957). We therefore read the complaint in the light most favorable to the plaintiff. *McKinney v. Debord*, 507 F.2d 501 (9th Cir. 1974); *De Witt v. Pail*, 366 F.2d 682 (9th Cir. 1966); 5 C. WRIGHT & A. MILLER, Federal Practice & Procedure, Section 1357 at 604 (1969)."

Documents attached to the complaint and incorporated therein by reference are treated as part of the complaint for purposes of a Rule 12(b)(6) motion. *Kaufman & Broad-South Bay v. UNISYS Corp.* (ND CA 1993), 822 F.Supp. 1468, 1472.

WAS TED AKIN A JUDGE ON NOVEMBER 22 AND DECEMBER 22, 1994? No. He was merely a layman. He had no appointment pursuant to the Texas Government Codes 74.052, 74.056 and 74.057 or any other law. Only the presiding Judge of the Administrative Judicial Region or the Chief Justice of the Supreme Court of Texas can make assignments of a former Court of Appeals Judge. There are no others, including Judge Hunt of the 160th District Court who are authorized to make such an assignment. Since he was not lawfully appointed a judge, Ted Akin was not a judge, but merely a layman, masquerading as a judge. Since he was not a judge, Ted Akin has no immunity, and the Solis Court should not pretend that he should be cloaked with any sort of immunity.

The amended complaint detailed with particularity all material facts on which this Plaintiff contended he would establish his right to recovery, including Defendant Akin's inability to successfully maintain the defense of immunity. This is consistent with *Elliott v. Perez*, (Cir. 5th 1985) 751 F.2d 1472 in Judge Brown's famous "Shenanigans in Plaquemines" case. In this regard, Sandy Hughes gave an affidavit showing the DATES Ted Akin was assigned, which attached documents show that he had no assignment on November 22 or December 22, 1994, and that on those dates NO TRIAL, NO MOTION FOR NEW TRIAL, and NO MATTER GROWING OUT OF A CASE TRIED existed.

Dallas Court of Appeals Judge Morris at Dolenz's Habeas Corpus hearing commented: "A District Court judge just can't ask a former judge coming off the elevator to operate his Court." (TR-216) You can't have a former judge appointed by judicial fiat; nor can you judicially legislate him power. You have to follow the statutes for a proper appointment, which was not done in this case. The Solis Court strains to counter the idea that Ted Akin wholly lacked jurisdiction on November 22 and December 22, 1994 by footnoting on TR 208 and bringing into play an unsupported concept of "the existence of the state court's inherent jurisdiction". The late Judge Brown of the 5th Circuit would probably comment: "Whitewash and hogwash". There is no inherent jurisdiction of a former judge who is not properly appointed. To the contrary, a man tried and convicted of murder had such a conviction voided where the judge was appointed by the governor. *Oates v. State*, 121 S.W. 370. Other appointments in violation of statutory requirements have resulted in void judgments as the "appointed judge" was not a judge. *Clements v. Ft. Worth & D.S.P. Ry. Co.*, 7 S.W.2d 895, *Bailey v. Triplett Bros.*, 278 S.W. 50 (Tex. Civ. App. – Amarillo, 1925); *Texas & Pacific Coal Co. v. Ready*, 198 S.W. 1034 (Tex. App. – El Paso, 1917).

In ruling on 12(b)(6) motions, the Solis Court "must accept all well pleaded facts as true" and "view them in the light most favorable to the plaintiff." *Cinel v. Connick*, 15 F.3d 1338, 1341 (Cir. 5th 1994). Since the pleadings show that Ted Akin was not a lawfully appointed judge, he lacks any judicial immunity, and this case should proceed to Trial on the merits. This Plaintiff contends that he has given adequate notice of the conspiracy theory

with sufficient particularity, which facts that would, if proved, warrant the relief sought consistent with *Johnson v. Wells,* (Cir. 5th 1978) 566 F.2d 1016.

Most would agree that a judge should not be subject to discovery or suit while in his official **capacity** unless and until facts can support the contention that the plea of immunity cannot be sustained. This is consistent with *Elliott v. Perez, supra.*

Here Ted Akin was not a judge on November 22 and December 22, 1994 and lacked immunity as pointed out in the pleadings. Note that Ted Akin has not denied any of the allegations under oath. As this Court knows, proof problems are disregarded in 12(b)(6) motions as a judgment on the pleadings is not proper where the complaint alleges facts which, if proven, would permit recovery. It is immaterial whether the Solis Court believes or not believes that the Plaintiff will succeed at trial *Wager v. Pro,* (D.C. Cir. 1976) 575 F.2d 882, 884.

Courts should embrace the Truth, and not suppress it, particularly in 12(b)(6) cases where discovery will serve justice and disclose supportive facts. The Texas Supreme Court in *Jampole v. Touchy,* 673 S.W.2d 569, 573-574 (Tex. 1984) emphasizes that "the ultimate purpose of discovery is to seek the truth so that disputes may be decided by what the facts reveal, not what facts are concealed".

Akin's exercise of irresponsible power to cover up his DARK SIDE, probably known to many in judicial circles who help cover up his psychopathology as they lack

courage to what is right, is tyranny and sullies the judiciary and incite people to revolution. Charles Sumner comments about corrupt judges: "Judges are but men, and in all ages have shown their fair share of frailty. Alas! The worst crimes of history have been perpetrated under their sanctions, the blood of martyrs and patriots, crying from the ground, summons them to judgment."

Akin's conduct is grounded in "pay back" and revenge and had no merit. The Avery case was dismissed by another judge without this Plaintiff having to pay anything, except the hefty fees paid to his attorneys.

Question two: Did the Trial Court err in dismissing the Civil Rights claims against Boundy and Avery, and refused to retain and adjudicate Dolenz's pendant state law and false imprisonment claims as the Court must accept as true all material allegations in the complaint, as well as reasonable inferences from them.

Boundy and Avery failed to timely file their 12(b) Motion and did not ask the Court for Rule 12(c) relief. These Defendants failed to respond to the pleadings within twenty days after service and the 12(b)(6) Motion should be filed within that twenty day period. *Farmers Elevator Nat. Ins., Co. v. Carl J. Austad & Sons, Inc.*, (8th Cir. 1965) 343 F.2d 7, 12. In this case, the 12(b) Motion was filed many months after the original answer.

These Defendants also have failed to give any facts that would controvert the Plaintiff's Complaint. All inferences reasonably gotten from the facts given in the Complaint must be construed in favor of the Plaintiff. *Herbert Abstract v. Touchstone Properties, CTO*, (5th Cir. 1990) 914 F.2d 75, 76 and *General Conference Corp. of Seventh-Day*

Adventists v. Seventh-Day Adventists Congregational Church, (9th Cir. 1990) 896 F.2d 1542, 1550. Avery and Boundy did not even file a brief with this Court.

CONCLUSION

This Petitioner contends that he should be in court trying this case, as to all defendants, on the merits for the reasons given in this Petition, and that the Courts below erred in granting and affirming the Defendants' 12(b)(6) motions.

WHEREFORE Petitioner respectfully prays that this Honorable Supreme Court grant this Petition for Certiorari setting this case for oral argument, sustain the questions raised herein, reverse the Judgments and Opinions given in the courts below, and remand this case to the Trial Court for further proceedings in accordance with this Court's instructions, and grant Petitioner such other and further relief to which he may be justly entitled.

Respectfully submitted,

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APPENDIX

Opinion, Fifth Circuit Filed October 23, 1997...App. 1

Judgment, Fifth Circuit Filed Oct. 23, 1997.....App. 3

Order Filed March 6, 1996.....App. 5

Final Judgment Filed Jan. 17, 1997.....App. 14

Petition For Panel Rehearing – Denied, Filed Dec. 3, 1997.....App. 16

Plaintiff's First Amended Original Complaint With Sandy Hughes Affidavit.....App. 18

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-10081
Summary Calendar

BERNARD J. DOLENZ,

Plaintiff-Appellant,

versus

JUDGE TED MARTIN AKIN, JOHN EARNEST BOUNDY, and MILDRED AVERY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3-95-CV-1605-P

(Filed Oct. 23, 1997)

Before JONES, SMITH, and STEWART, Circuit Judges.

PER CURIAM:*

Bernard Dolenz appeals the dismissal of his § 1983 complaint pursuant to Fed. R. Civ. P. 12(b)(6) and 12(c). We have reviewed the record, and, for substantially the

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

same reasons stated by the district court, we affirm the dismissal. *See Dolenz v. Akin*, No. 3:95-CV-1605-P (N.D. Tex. Mar. 6, 1996 and Jan. 14, 1997).

The district court did not abuse its discretion in refusing to allow Dolenz to engage in further discovery pending its determination of the referenced motions to dismiss. *Richardson v. Henry*, 902 F.2d 414, 417 (5th Cir. 1990); *Elliott v. Perez*, 751 F.2d 1472, 1478 (5th Cir. 1985). As for Dolenz's state-law claims, the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over those claims. *See Cinel v. Connick*, 15 F.3d 1338, 1344 (5th Cir. 1994).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-10081
Summary Calendar

D.C. Docket No. 3:95-CV-1605-P

BERNARD J DOLENZ

Plaintiff – Appellant

v.

TED MARTIN AKIN, Judge;
JOHN EARNEST BOUNDY;
MILDRED AVERY

Defendants – Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas.

Before JONES, SMITH and STEWART, Circuit Judges.

JUDGMENT
(Filed Oct. 23, 1997)

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: DEC 11 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BERNARD J. DOLENZ, Plaintiff,	§	CIVIL ACTION NO. 3:95-CV-1605-P
v.	§	
JUDGE TED MARTIN AKIN, JOHN EARNEST BOUNDY, and MILDRED AVERY, Defendants.	§	

ORDER
(Filed Mar. 6, 1996)

Presently before the Court is Defendant Judge Ted Martin Akin's Motion to Dismiss, filed August 25, 1995; Plaintiff's Brief and Response to Judge Akin's Motion to Dismiss, filed September 8, 1995; and Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss, filed September 22, 1995.

Upon full consideration of the motion, response, reply, and the applicable law, the Court has determined that Defendant's Motion should be and is hereby **GRANTED**. The Court so finds for the reasons set forth herein.

Background

Plaintiff Bernard J. Dolenz filed his original complaint on August 4, 1995, alleging false imprisonment and violations of 42 U.S.C. §1983. Dolenz contends his rights were violated when he was incarcerated by Defendant

Judge Ted Martin Akin ("Akin") for contempt on two occasions, November 22, 1994 and December 22, 1994.

Defendant Akin argues that Plaintiff's claims against him should be dismissed on the grounds that Akin is entitled to Eleventh Amendment immunity from suit in his official capacity, and is shielded by judicial immunity in his individual capacity. While it is not clear from Plaintiff's complaint if he is suing Defendant Akin in his official and individual capacity, the Court will address both theories of liability in turn.

12(b)(6) Motion to Dismiss

A plaintiff's complaint may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim for which relief can be granted. In ruling on such a motion, the court will take all factual allegations of the complaint as true and resolve any ambiguities or doubts regarding sufficiency of the claim in favor of the plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278, 284 (5th Cir. 1993). A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45 (1957). However, conclusory allegations and unwarranted deductions of fact are not admitted as true. *Assoc. Builders, Inc. v. Alabama Power Co.,* 505 F.2d 97, 100 (5th Cir. 1974); *FDIC v. Harrington,* 844 F. Supp. 300, 302 (N.D. Tex. 1994); 2A Moore's Federal Practice §12.07 at 12-64 n.6 (2d ed. 1991).

Official Capacity: Eleventh Amendment Immunity

The Eleventh Amendment to the Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State," and Supreme Court decisions have recognized that "an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984), *citing Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 294 (1973).

As a suit against an official in his official capacity is essentially a suit against the state, Eleventh Amendment immunity protects such an official who is sued in his official capacity to the extent that the state entity would be immune. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Kentucky v. Graham*, 473 U.S. 159 (1985). In the particular context of a civil rights action under §1983, the Supreme Court has held that an official who is sued for monetary relief is not a "person" within the meaning of §1983. *Will*, 491 U.S. at 71.[1]

Accordingly, the Court finds that Defendant Akin is immune from suit in his official capacity.

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[1] In this case, it is clear that the Plaintiff seeks monetary as opposed to injunctive relief from Defendants. (Pl.'s First Am. Compl. ¶¶31-37).

Individual Capacity: Judicial Immunity

Defendant Akin next claims that he is immune from suit in his individual capacity due to the shield of judicial immunity. *Bradley v. Fisher*, 13 Wall. 335 (1872) was one of the first cases to incorporate the concept of judicial immunity into federal jurisprudence, and its holding retains its validity today. The *Bradley* Court explained that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, are alleged to have been done maliciously or corruptly." *Id.* at 351. The Court explained the rationale for providing judicial acts with extensive immunity by stating that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* at 347. More recently, the Supreme Court has held that this immunity can only be overcome in two instances: a judge is not protected from liability for nonjudicial actions, or for actions taken in complete absence of all jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 12 (1991).

The Fifth Circuit generally conducts a four-prong injury to determine which are "judicial" actions. This test asks whether (1) the precise act complained of was a normal judicial function; (2) the events involved occurred in the courtroom or adjunct spaces, such as the judges chambers; (3) the controversy centered around a case then pending before the judge; and (4) the act arose directly and immediately out of a visit to the judge in his official capacity. *Holloway v. Walker*, 765 F.2d 517, 524 (5th

Cir. 1985) *citing McAlester v. Brown*, 468 F.2d 1280 (5th Cir. 1972). The *Holloway* court emphasized that the term "judicial act" must be broadly construed to realize the policies behind immunity. *Id.*

In this case, it appears that Akin's actions were "judicial" in nature. Incarceration pursuant to a finding of contempt is a normal judicial function, the events occurred in the courtroom subsequent to a hearing on sanctions, the controversy did arise out of a case pending before Judge Akin, and the Plaintiff was before Akin in his official capacity.

The Court must next consider whether Akin was acting in the complete absence of all jurisdiction. The *Bradley* Court observed the important distinction between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter, stating that:

> Where there is clearly no jurisdiction over the subject matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case . . . 13 Wall., at 351-52.[2]

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[2] The Court illustrated this distinction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from

Since that time, courts consistently have construed the term "jurisdiction" broadly, to effectuate the policies of judicial immunity. *Stump v. Sparkman*, 435 U.S. 349, 356-57; *Holloway*, 765 F.2d at 723. For example, a judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors. *Stump*, 435 U.S. at 359. In *Holloway*, the court even found that the state court judge had sufficient subject matter jurisdiction under the judicial immunity inquiry, even if he was without jurisdiction to conduct proceedings under Texas law. 765 F.2d at 524.

In his complaint, Dolenz argues that Akin's acts were taken in the absence of all jurisdiction, and Dolenz offers two bases for this assertion. First, he states that Akin was a former Appellate Court Justice who had been improperly appointed as a visiting judge and therefore "was not lawfully sitting for the Judge of the 160th Judicial District Court and had no authority to enter the Contempt judgment" at the time of the hearings on November 22 and December 22. (Pl.'s Compl. ¶15) Additionally, with respect to the second contempt order on December 22, Dolenz contends that a Notice of Removal had been filed earlier that same day with the Clerk of the state court, which stripped Akin of jurisdiction to proceed in the case. (Pl.'s Compl. ¶¶17-21)

With respect to Dolenz's first objection, that Akin was improperly appointed as a visiting judge, the Court

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liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. *Id.* at 352.

finds that the evidence upon which Plaintiff relies does not establish that Akin was acting without authority.[3] Plaintiff alleges that Akin's appointments did not include the specific dates on which Akin entered the contempt orders. (March 1, 1994 and June 6, 1994 Orders signed by Pat McDowell, Presiding Judge of the First Administrative Judicial Region). These Orders, however, stipulate that assignments are not only for the specific date listed, but are to continue for the period of one week. For example, it appears that Akin's assignment for November 17, 1994 continued for one week, until November 24, 1994. More importantly, the Orders provide that the "assignment shall continue after the specified period of time as may be necessary for the assigned judge to complete trial of any case or cases begun during this period, and to pass on motions for new trial and all other matters growing out of cases tried by the Judge herein assigned during this period."

With respect to Dolenz's other argument, that Akin acted in complete lack of jurisdiction on December 22 due to the filing of a Notice of Removal, the Court again finds

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[3] Even assuming that Plaintiff's suspicion is true, that Akin was not properly assigned on the dates he issued the contempt orders, this does not question the existence of the state court's inherent jurisdiction. Judge Akin, as a former state Appellate Court Justice presiding as a visiting judge in the 160th Judicial District, a court of general subject matter jurisdiction under Texas law, was vested with the authority to exercise jurisdiction over this case. He was generally empowered to conduct proceedings of the sort that are at issue in this case. *See Holloway*, 765 F.2d at 523. Therefore, Akin was not acting in the "complete absence of all jurisdiction" as contemplated by the concept of judicial immunity.

that this does not suggest a "complete lack of all jurisdiction" as that concept has come to be understood within the framework of judicial immunity. The Court finds that this action is more accurately characterized as an act taken in excess of jurisdiction, rather than an act in the absence of all jurisdiction. *Antelman v. Lewis*, 480 F. Supp. 180, 184 (D. Mass. 1979) (holding that any action taken by a state court judge in the interval between removal and remand is more in the nature of an act taken in excess of jurisdiction).

As previously mentioned, as a Judge of the District Court of Dallas County, Texas, Akin was sitting as a judge in a court of general jurisdiction; that court's subject-matter jurisdiction plainly extended to the type of proceedings at issue in this case. Regardless of whether Akin's contempt order was effective at the time it was entered, Akin was not acting in the "complete absence of all jurisdiction." As the court explained in *Antelman*,

> whatever the meaning of "jurisdiction" may be as used in judicial opinions concerning the effectiveness of orders entered by a state court after a petition for removal has been filed and before remand, that meaning does not determine the clearly distinguishable question whether the state court has such "jurisdiction over the subject-matter" as will support absolute immunity of the judge from an action for damages based on the state judge's orders. *Id.* at 184.

Accordingly, the Court finds that Defendant Akin is entitled to absolute judicial immunity and is not liable for damages in his individual capacity. Thus, his Motion to Dismiss is GRANTED.

So Ordered.

Signed this 5th day of ~~February~~ March 1996.

/s/ Jorge A. Solis
JORGE A SOLIS
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BERNARD J. DOLENZ, Plaintiff, v. JUDGE TED MARTIN AKIN, JOHN ERNEST [sic] BOUNDY, and MILDRED AVERY, Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. 3:95-CV-1605-P

FINAL JUDGMENT

(Filed Jan. 17, 1997)

Pursuant to the Court's Memorandum Opinion and Order filed in this action on January 14, 1997, the Court has determined that,

It is **ORDERED, ADJUDGED** and **DECREED** that:

1. Plaintiff BERNARD J. DOLENZ, take nothing of his Section 1983 claims as to defendants against the defendants JUDGE TED MARTIN AKIN, JOHN EARNEST BOUNDY, and MILDRED AVERY.

2. All remaining state law claims against defendants JOHN EARNEST BOUNDY, and MILDRED AVERY are dismissed without prejudice.

3. Accordingly, all costs incurred by the defendants JUDGE TED MARTIN AKIN, JOHN EARNEST BOUNDY, and MILDRED AVERY, shall be assessed against the plaintiff.

IT IS SO ORDERED.

Signed this 16th, day of January 1996, at Dallas, Texas.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF TEXAS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-10081

BERNARD J DOLENZ

Plaintiff-Appellant

v.

TED MARTIN AKIN, Judge;
JOHN EARNEST BOUNDY;
MILDRED AVERY

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion October 23, 1997, 5 Cir., F.3d)

(Filed Dec. 3, 1997)

Before JONES, SMITH and STEWART, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R.

APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J.A.S.
United States Circuit Judge

JURY TRIAL DEMANDED

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BERNARD J. DOLENZ

Plaintiff,

v. CIVIL ACTION NO. 395CV1605-P

JUDGE TED MARTIN AKIN,
JOHN EARNEST BOUNDY, and
MILDRED AVERY

Defendants.

PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES BERNARD J. DOLENZ, Plaintiff, ("DOLENZ") who complains of JUDGE TED MARTIN AKIN ("AKIN"), JOHN EARNEST BOUNDY ("BOUNDY"), and MILDRED AVERY ("AVERY") as Defendants and files this his First Amended Original Complaint and would show the Court as follows:

PARTIES

1. BERNARD J. DOLENZ, Plaintiff, is a Dallas County resident whose address is 6102 Swiss Avenue, Dallas, Texas 75214.

2. JUDGE TED MARTIN AKIN has been served, and a 12(b)(6) Motion is before the Court.

3. JOHN EARNEST BOUNDY has answered herein and is before the Court.

4. MILDRED AVERY has answered herein and is before the Court.

JURISDICTION AND VENUE

5. This action is appropriate in Federal Court pursuant to Civil Rights violations, 42 U.S.C.A. § 1983 and false imprisonment. The acts complained of occurred in Dallas, Dallas County, Texas.

BACKGROUND OF THE CASE

6. DOLENZ was held in contempt and jailed on two occasions, November 22, 1994 and December 22, 1994.

7. BOUNDY, AKIN and AVERY had the intent to confine DOLENZ and did actions of an order resulting in the confinement and incarceration of DOLENZ on two occasions. These Defendants were conscious that DOLENZ's confinement would result in harm in the Dallas County Jail.

8. This direct restraint by the actions of each of the Defendants caused DOLENZ to be deprived of physical liberty without adequate legal justification.

9. During each of the incarcerations AKIN acted wholly without jurisdiction and this was a clear usurpation of power. BOUNDY and AVERY knew, or should have know, that AKIN was without jurisdiction at the proceedings in which the Order of Commitment for Contempt was made. BOUNDY and AKIN were aware there

was no statutory authority to commit DOLENZ for the alleged contempt. Accordingly, each of the Defendants should be properly held for this Plaintiff's false imprisonment.

10. The Plaintiff contends that each of the Defendants acted with malice factuated by corrupt or malicious motives. BOUNDY and AVERY in their prosecution with AKIN knew that their authorities were exceeding their jurisdiction in sentencing and committing DOLENZ, and in doing so acted willfully, maliciously, and corruptly, with full knowledge of the lack of jurisdiction.

11. BOUNDY was not acting in good faith on behalf of his client Mildred Avery in the detention of DOLENZ since BOUNDY was to be paid for purported discovery abuses and not his client. At all times BOUNDY and his client AVERY requested and urged a Commitment for Contempt. BOUNDY and AVERY acted with malice and improper motive in trying to coerce the Plaintiff into paying money and trying to impute irrevocable trust assets to DOLENZ. Further, BOUNDY as an attorney and his client AVERY were prosecuting and directing the unlawful arrest and detention when they knew that their participation was the cause of the illegal detention and imposed where they knew or should have known that the Court did not have jurisdiction.

CAUSE OF ACTION NO. 1 FALSE IMPRISONMENT

12. DOLENZ ADOPTS THE FOREGOING PARAGRAPHS AS IF FULLY SET FORTH.

13. Dolenz is a Defendant in a Civil Action filed against him by Mildred Avery, Cause No. 92-5763-H, pending in the 160th Judicial District Court of Dallas County, Texas. During the discovery process a discovery dispute arose regarding the production of various documents and the amount of DOLENZ's net worth. Dolenz maintains that he had a negative net worth and that the assets of the irrevocable trusts could not be imputed to his net worth. In spite of this AKIN ordered DOLENZ to jail until he would pay the sum of $14,596.65 to BOUNDY knowing full well that one cannot be imprisoned for debt. Channel 8 was recording the proceedings which was subsequently televised over objection. The Defendants were aware of Channel 8's presence before the proceedings were heard. Even though AKIN repeatedly reminded DOLENZ that he was a member of the Bar and even though DOLENZ field with the District Court his Motion to be Released on his own personal recognizance and to have another judge determine his guilt or innocence in accordance with § 21.002 of the Texas Government Code, AKIN promptly denied same and emphasized *he* had already found the relator guilty of contempt and denied him the statutory right pursuant to § 21.002, Texas Government Code.

14. Subsequently the Appeals Court found in favor of DOLENZ and found that his incarceration violated the Constitution of the State of Texas, Article 1, § 18 as it constituted imprisonment for debt. This BOUNDY, AVERY, and AKIN knew beforehand. AKIN is particularly culpable because he sat on a panel where this issue had arisen and found that one could not be imprisoned for debt. That opinion is appended.

15. Former Judge Ted AKIN was not lawfully sitting for the Judge of the 160th Judicial District Court and had no authority to enter the contempt judgment. At the time of the hearings and Orders on November 22, 1994 and December 22, 1994:

a. Ted Akin was not a duly elected or appointed Judge;

b. Rather, he was a former Appellate Court Justice;

c. Ted Akin had not been assigned pursuant to the Texas Government Codes 74.049 and 75.052 at all or any other law;

d. And, therfore not a Judge or any other governmental official.

The Affidavit of Sandy Hughes, attached hereto as Exhibit "A" and incorporated herein as if fully set forth, shows that AKIN was not properly assigned by the presiding Judge on November 22, 1994 and December 22, 1994.

Nevertheless, AKIN purported to act as a Judge, and acting under color of State law and wholly without jurisdiction incarcerated DOLENZ on November 22, 1994 and December 22, 1994.

16. Over objection Judge AKIN was appointed by an Order of the true Judge of the 160th Judicial District Court, Lynn Hunt, on July 11, 1994. There is no authority that authorizes a regular judge of the Court to assign a case such as this to a former Court of Appeals judge. It is well settled that the disqualification of a judge affects his very jurisdiction and the power to act, and cannot be waived. *Houston General Insurance Company v. Ater,* 843

S.W.2d 225 (Tex. App. – El Paso 1992). Likewise, any order entered by a disqualified judge is a nullity and absolutely void. *Starnes v. Chapman*, 739 S.W.2d 104 (Tex. App. – Dallas 1990).

17. The second order of commitment of December 22, 1994 is even more egregious as the 160th Judicial District Court of Dallas County, Texas had lost jurisdiction of this matter prior to the signing of the Order of Contempt and Commitment, as the cause had been removed to the United States District Court. Exhibit "D" attached hereto and incorporated herein as if fully set forth, is the Statement of Facts concerning the removal to Federal Court on December 22, 1994 and the conduct of both AKIN and BOUNDY in continuing the case culminating in DOLENZ's incarceration.

18. As BOUNDY and AKIN knew beforehand, once a proceeding is removed to Federal Court and a copy of the Notice of Removal is filed with the clerk of the State Court the Removal is perfected: "and the state court shall proceed no further unless and until this case is remanded." 28 U.S.C.A. § 1446(d)

19. Since the court knew that the subject action was removed based on the Federal bankruptcy proceeding wherein Mildred Avery was the debtor BOUNDY, AVERY, and AKIN knew or should have known that once a copy of the Removal was filed with the Clerk of the Court for which the cause was removed that "the parties shall proceed no further in that court unless and until the claim or cause of action is remanded." Bankruptcy Rule 9027(c), 11 U.S.C.A.

20. BOUNDY, AVERY, and AKIN knew that once Notice of Removal was given the State court must stop all proceedings until its determination on the merits of the removal is made by the Federal court. *Medrano v. State of Texas*, 580 F.2d 803 (5th Cir. 1978); and this applies to any phase of the litigation in state court, *Lowe v. Jacobs*, 243 F.2d 432 (5th Cir. 1957), *cert. den.*, 355 U.S. 842. Removal of the case ends the power of the state court because the entire case is then before the federal court. *Farias v. Bexar County Bd. of Trustees*, 925 F.2d 866 (5th Cir. 1991), *cert. den.*, 112 S.Ct. 1931.

21. Other Texas Courts have recognized the above principles. For example, in *Brogdon v. Ruddell*, 717 S.W.2d 675 (Tex. App. – Texarkana 1986), writ ref'd n.r.e., the court, citing 50 Tex.Jur.2d § 40 (1969), with approval, stated:

> "Once the case has been effectively removed, all proceedings in the state court while the suit is pending in the federal court are *coram non judice* and void, even though the case is thereafter remanded by the federal court for want of jurisdiction."

To the same effect are *Henke Grain Co. v. Keenan*, 658 S.W.2d 343 (Tex. App., Corpus Christi 1983), no writ hist., and *Consolidated Underwriters v. McCauley*, 320 S.W.2d 60 (Tex. Civ. App. – Beaumont 1959), writ ref'd n.r.e.

22. Both BOUNDY and AKIN knew that there is no evidence to support the criminal contempt judgment that Relator failed to produce any documents that he was previously ordered to produce. In *Ex parte Hightower*, 877 S.W.2d 17 (Tex. App. – Dallas 1994), this Court stated:

> "As a reviewing court, we may only determine if the trial court's contempt findings are so completely without evidentiary support that the trial court's judgment is void because it deprives a relator of liberty without due process of law." 877 S.W.2d at 20.

The Judgment of Contempt and Order of Commitment of December 22, 1994, recites that:

> "2. Defendant DOLENZ failed to produce the court ordered documentation of his financial net worth within thirty days as ordered by the Court."

DOLENZ knows of no evidence offered to the court below that Relator failed to produce his financial net worth.

23. BOUNDY, AVERY, and AKIN knew or should have known that the Contempt Judgment relating to Relator's failure to pay the $25,000.00 sanction fine violates Article 1, § 18, of the Constitution of the State of Texas, which provides that no person shall ever be in prison for debt. The sanction order created a debt (although not yet conformed in a final judgment of the court or reviewed by a higher court), payable directly to the Plaintiff's attorney, John Ernest Boundy, in the amount of $25,000.00, for which Relator has now been imprisoned for failure to pay within thirty (30) days, notwithstanding Article 1, § 18, of the Texas Constitution, which provides:

> "No person shall ever be imprisoned for debt."

The failure to comply with a court order to pay a "debt" is not contempt punishable by imprisonment

because of the above constitution provision; such an order may be enforced by other legal processes, such as execution or attachment of property, but not by imprisonment of the adjudicated debtor. *Ex parte Hall*, 854 S.W.2d 656 (Tex. 1963); *Ex parte Yates*, 387 S.W.2d 377 (Tex. 1965). The only exceptions to this rule are that a trustee may be held in contempt for failing to turn over funds, and an obligation to pay child or spousal support. *Ex parte Rogers*, 633 S.W.2d 666 (Tex. App. – Amarillo 1982); *Ex parte Hall, supra.*

As Judge Akin should have recalled from participating in ex parte Jackson, this constitutional rule against imprisonment for failure to pay a debt applies to the failure to pay a sanction order. Additionally, 28 U.S.C. § 2007(a) dealing with imprisonment for debt states "a person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State where imprisonment for debt has been abolished. . . . " Both AKIN and BOUNDY violated this States by incarcerating DOLENZ concerning the debt. The Appeals Court Opinion and Judgment is attached as Exhibit "B" and "C" and incorporated herein by reference as if fully set forth.

24. BOUNDY, AVERY, and AKIN knew that a monetary sanction's order cannot be enforced by contempt because such denies Relator the right to review on appeal from the final judgment as expressly provided in Rule 215, T.R.C.P.

DOLENZ asserts that a discovery sanction order, particularly a monetary fine of the magnitude of $25,000.00 cannot be enforced by contempt because such action

would deny Relator his right to appellate review of the underlying sanctions order as expressly provided in Rule 215, T.R.C.P. Every order entered under Rule 215, T.R.C.P., whether it is upon a motion to compel, a motion for sanctions, or for abuse of discovery is expressly made "subject to review on appeal from the final judgment." That being the case, if such an order can be enforced by contempt, from which there is no appeal, then a trial court can completely circumvent the appellate provisions of the rule by finding one in contempt and exacting from the contempt or punishment, which punishment may never be able to be restored to the contemptor.

25. BOUNDY, AVERY, and AKIN knew or should have known that Judge Ted M. Akin was not lawfully sitting for the Judge of the 160th District Court and had no authority to enter the contempt judgment as his appointment was made by an Order of the true Judge of the 160th Judicial District Court, Lynn Hunt, by written order of July 11, 1994, which stated:

> "It is further ORDERED that this case be placed on Judge Ted M. Akin's permanent docket as visiting judge of this Court and that he hear all further motions in this matter."

This order was given with Judge Hunt knowing of the objection of DOLENZ and there appears to be no authority that authorizes the regular judge of a court to assign a case such as this to a former Court of Appeals Judge.

26. The Defendants caused the willful detention without the consent of DOLENZ and were without authority of law:

a. AKIN was a layman and purported to act as a Judge without any legal authority as he had no valid assignment on November 22, 1994 as shown in Exhibit "A". He had no valid assignment for December 22, 1994 and was additionally without authority as this case had been removed to Federal Court as shown in Exhibit "D";

b. The Defendants knew that DOLENZ was a constitutionally protected from imprisonment for debt. Article 1, § 18, Texas Constitution and 28 U.S.C. § 2007(a);

c. The Defendants violated the U.S. Constitution Amendments 5, 8, and 14 which provide protection to Dolenz:

   i. " . . . no person shall . . . be deprived of life, liberty, or property without due process of law." Amendment 5 U.S. Constitution;

   ii. " . . . nor excessive fines imposed, nor cruel and unusual punishments inflicted." Amendment 8 U.S. Constitution;

   iii. " . . . ; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction equal protection of the laws." Amendment 14, §1 U.S. Constitution;

d. Life, liberty, or property was deprived without due process of law as the Defendants knew and were on notice of the above constitutional provisions that gave protection to DOLENZ. Even though BOUNDY and AVERY were informed about the violations of the Texas Constitution, Article 1, §8 and the U.S. Constitution Amendments, they continued with the prosecution in

concert with AKIN and color of law and incarcerated DOLENZ over objections of his attorneys. Exhibits "D" and "E";

e. AKIN refused to allow an impartial Judge to determine the guilt or innocence in accordance with §21.002 of the Texas Government Code and accordingly the State failed to provide due process in accordance with this right and DOLENZ suffered incarceration;

f. The Defendants reached an understanding to violate the Plaintiff's constitutional rights by incarcerating him under color of law while all the Defendants knew or should have known that AKIN was a layman and not a Judge with any jurisdiction whatsoever. The conduct of AKIN, BOUNDY, and his client AVERY is such that they had a meeting of minds to enforce incarceration and had ex parte conversations concerning DOLENZ. This action of conspiracy among AKIN, BOUNDY and AVERY was such that they reached an understanding to violate the Plaintiff's constitutional rights by incarcerating him and violated Amendments 5, 8, and 14 of the U.S. Constitution and Article 1, §18 of the Texas Constitution. These Defendants acted with an understanding and purpose to deprive DOLENZ of his constitutional rights and did overt acts including incarceration and those acts given in Plaintiff's Exhibit "E" wherein DOLENZ was injured thereby; and

g. BOUNDY and AVERY reached an understanding with AKIN to assert theories of law that are inconsistent with case law and the Constitution of the United States and Texas. Plaintiff's Exhibit "E" is incorporated herein as if fully set forth.

CAUSE OF ACTION NO. 2
CIVIL RIGHTS VIOLATIONS

27. DOLENZ adopts the foregoing paragraphs as if fully set forth.

28. BOUNDY, his client AVERY, and AKIN knew that the two incarcerations were executed where there was clearly no jurisdiction over the subject matter and that jurisdiction was lacking. In this regard there is "clear absence of all jurisdiction" and that the judge in concert with BOUNDY acted in a non-judicial capacity and deprived DOLENZ of his civil rights pursuant to 42 U.S.C. 1983.

29. During the two incarcerations, both BOUNDY as an officer of the court, and AKIN were acting under the color of state law and in doing so deprived DOLENZ of his liberty, privileges to be free, and immunities guaranteed by the Constitution or Laws of the United States. The rights violated included an assault of being hand cuffed and which denied DOLENZ's right to be secure in his person, this right is grounded in the due process clause of the Fourteenth Amendment. DOLENZ contends that both BOUNDY and AKIN lacked jurisdiction for their acts as the acts were done in clear absence of all jurisdiction. To continue each of the incarcerations over objection and depriving DOLENZ who is a licensed attorney in the state of Texas and as an officer of the court, violated 42 U.S.C. §1983, 21.002 of the Texas Government Codes depriving DOLENZ of his rights and remedies knowingly and willfully by both BOUNDY and AKIN.

30. Paraphrasing *Gregory v. Thompson*, 500 F.2d 59 (1971), immunity is thought necessary to insulate judges

from intimidation that might rob them of the independence so crucial to the public's interest in principal and fearless decision making. However, immunity is not for the protection of benefit of a malicious or corrupt judge but for the benefit of the public.

CAUSE OF ACTION NO. 3
DAMAGES AND EXEMPLARY DAMAGES

31. The Plaintiff sustained damages and injury to his business as a physician and lawyer. His business and clinic at 1719 W. 10th Street have been closed because patients/clients became aware of the incarcerations through the television media of Channel 8 and which implied there was wrongdoing on the part of the Plaintiff. The Court of Appeals in both instances have upheld DOLENZ and have reversed the contempt proceedings pursuant to two Petitions for Writ of Habeas Corpus. DOLENZ sues for mental suffering and humiliation, shame and fright because of the incarceration and being hand cuffed before the media, having Channel 8 publish and circulate this throughout the greater North Texas community, causing hatred, contempt, and ridicule. In addition, there was physical discomfort in jail where a back problem was aggravated. DOLENZ also caught the flu because of the close proximity of other people in jail who were coughing and who had evidence of the flu themselves. In addition, this Plaintiff sues for the value of the time lost and the injury done to his business relationships and the destruction of the doctor-patient relationships with his patients.

32. Because of the above-described damages, the Plaintiff has to obtain legal services to obtain the two Writs of Habeas Corpus because of the illegal and void acts of AKIN, which he knew or should have known were not grounded in law and that he lacked jurisdiction.

33. For the above-described actual damages Plaintiff sues for no less than $2,000,000.00.

34. For exemplary damages, BOUNDY, AVERY, and AKIN acted recklessly, willfully, and maliciously and with a design to oppress and injure the Plaintiff. They knew that it would be foreseeable that the Channel 8 dissemination of the two contempt proceedings would be damaging to DOLENZ's reputation and that this was grounded in maliciousness.

35. That it was grounded in maliciousness is indicated by the opinion in Re: Jackson, on which panel AKIN sat; because AKIN refused to recuse himself even though repeatedly requested because of his judicial misconduct not related to this case and about which DOLENZ as an officer of the court had a duty to report to the proper judicial credentialing authority; and also because AKIN knew that DOLENZ knew some of the parties involved with George Dahl, a case in which AKIN was unsuccessful in being George Dahl's guardian and for which AKIN received an adverse malicious prosecution judgment in seven figures.

36. Because of the recklessness, willfulness, and maliciousness, this Plaintiff is asking for exemplary damages no less than three times the actual damages.

37. DOLENZ also sues for reasonable attorneys' fees for the habeas corpus proceedings and the collateral proceedings that have stemmed from the conduct of BOUNDY, AVERY, and AKIN. In this regard, DOLENZ is seeking no less than $50,000.00 for the attorneys' fees that he has expended and also seeks $60,000.00 for attorney's fees for the trial of this case in Federal court and $25,000.00 in the event it is appealed to the Fifth Circuit, and an additional $25,000.00 in the event it is appealed to the U.S. Supreme Court.

WHEREFORE, PREMISES CONSIDERED, BERNARD J. DOLENZ seeks judgment both jointly and severally of JOHN BOUNDY, MILDRED AVERY, and Judge TED MARTIN AKIN for no less than $2,000,000.00 in actual damages and no less than three times actual damages for punitive damages, prejudgment interest on the actual damages from November 22, 1994, attorneys' fees, costs of court, and for such other and just relief as the Plaintiff may show himself entitled.

Respectfully submitted,

LAW OFFICES OF
BERNARD J. DOLENZ

/s/ Bernard J. Dolenz
BERNARD J. DOLENZ, J.D., M.D.
TBN: 05957750

6102 Swiss Avenue
Dallas, Texas 75214
(214) 821-0220

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent by regular mail to G. Stewart Whitehead, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548 and to Michael Scates, 7906 Vienna Drive, Plano, Texas 75025 on September 30, 1995.

/s/ Bernard J. Dolenz
BERNARD J. DOLENZ, J.D., M.D.

PLAINTIFF'S
EXHIBIT
A

AFFIDAVIT OF SANDY HUGHES

Before me, the undersigned authority, personally appeared SANDY HUGHES, who, being by me duly sworn, deposed as follows:

1. My name is SANDY HUGHES.

2. I have personal knowledge of all that is set forth in this affidavit, and it is all true and correct.

3. I am sane, over eighteen (18) years of age, and otherwise fully competent to make this affidavit.

4. I am employed by the First Administrative Judicial Region of The State of Texas as an Administrative Assistant.

5. I am a custodian of the records of the First Administrative Judicial Region of The State of Texas and the Presiding Judge of that Region.

6. Copies of all orders of assignments of retired and former justices and judges signed by the Presiding Judge of the First Administrative Judicial Region of the State of Texas pursuant to Chapter 74 of the Texas Government Code are kept in the records of that Region.

7. I certify that true and correct copies of two separate one-page orders of assignment that

appear in the records of the First Administrative Judicial Region of The State of Texas are attached to this affidavit.

8. I have made a diligent search of the records of the First Administrative Judicial Region of The State of Texas, and found no other order by which the Honorable Former Justice Ted M. Akin was assigned by the Presiding Judge of that Region to preside over civil actions pending in the 160th Judicial District Court of Dallas County, Texas in 1994 in the records of that Region.

/s/ Sandy Hughes
SANDY HUGHES

SWORN TO AND SUBSCRIBED before me on the 2nd day of ~~January,~~ February, 1995.

[SEAL]

SUE BENNETT
Notary Public, State of Texas
My Comm. Expires 5-1-96

/s/ Sue Bennett
Notary Public, State of Texas

THE STATE OF TEXAS
FIRST ADMINISTRATIVE JUDICIAL REGION
ORDER OF ASSIGNMENT BY THE
PRESIDING JUDGE

Pursuant to Section 74.056, Texas Government Code, I hereby assign the Honorable Ted Akin,

Judge of the County Court at Law No. _____ of _____ County, Texas, (OR)

_____ Senior or _____ Former Judge of County Court at Law No. _____ of _____ County, Texas (OR)

Judge of the _____ District Court (OR)

_____ Senior or X Former Judge of the Fifth Court of Appeals ~~District Court.~~

To the County Court at Law No. _____ of _____ County, Texas. (OR)

To the 160th District Court of Dallas County, Texas. (OR)

To the _____ Administrative Judicial Region of Texas, for reassignment by the Presiding Judge thereof.

see condition of assignment

This assignment is for the period of 1 week(s), (or) ____ day(s) beginning the _____ day of _____, 1994, provided that this assignment shall continue after the specified period of time as may be necessary for the assigned judge to complete trial of any case or cases begun during this period, and to pass on motions for new trial and all other matters growing out of cases tried by the Judge herein assigned during this period. The Clerk is directed to post a copy of this assignment on the notice board so attorneys and parties may be advised of this assignment, in accordance with law.

CONDITION(S) OF ASSIGNMENT (IF ANY):

This assignment is for the following dates:

March 24, 1994	May 12, 1994	June 9, 1994
March 31, 1994	May 19, 1994	June 15, 1994
April 7, 1994	May 26, 1994	June 30, 1994.
April 14, 1994	June 2, 1994	
April 21, 1994		
April 28, 1994		
May 5, 1994		

ORDERED this 1st day of March, 1994.

/s/ Pat McDowell
PAT McDOWELL
Presiding Judge
First A. J. R.

/s/ Sandy Hughes
Sandy Hughes
Administrative Assistant

THE STATE OF TEXAS
FIRST ADMINISTRATIVE JUDICIAL REGION
ORDER OF ASSIGNMENT BY THE
PRESIDING JUDGE

Pursuant to Section 74.056, Texas Government Code, I hereby assign the Honorable Ted Akin,

Judge of the County Court at Law No. _____ of _____ County, Texas, (OR)

_____ Senior or _____ Former Judge of County Court at Law No. _____ of _____ County, Texas (OR)

Judge of the _____ District Court (OR)

_____ Senior or X Former Judge of the Fifth Court of Appeals ~~District Court.~~

To the County Court at Law No. _____ of _____ County, Texas. (OR)

To the 160th District Court of Dallas County, Texas. (OR)

To the _____ Administrative Judicial Region of Texas, for reassignment by the Presiding Judge thereof.

see dates below

This assignment is for the period of 1 week(s), (or) ____ day(s) beginning the _____ day of _____, 1994, provided that this assignment shall continue after the specified period of time as may be necessary for the assigned judge to complete trial of any case or cases begun during this period, and to pass on motions for new trial and all other matters growing out of cases tried by the Judge herein assigned during this period. The Clerk is directed to post a copy of this assignment on the notice board so attorneys and parties may be advised of this assignment, in accordance with law.

CONDITION(S) OF ASSIGNMENT (IF ANY):

This assignment is for the following dates: July 7; July 28; August 11; August 25; Sept. 8; Sept. 22; Oct. 6; Oct. 20; Nov. 3 and Nov. 17, 1994

ORDERED this 6th day of June, 1994.

/s/ Pat McDowell
PAT McDOWELL
Presiding Judge
First A. J. R.

/s/ Sandy Hughes
Sandy Hughes
Administrative Assistant